

should be considered further, the Secretary or designee shall order the Director to reinstate the complaint and resume the administrative process. If, pursuant to either paragraph (a) or (b) of this section, a complaint has been dismissed because the complainant has pursued a remedy available under State or other applicable law, the complaint, upon written request by the complainant, will be subject to automatic reinstatement if the matter cannot be resolved under State or other applicable law due to a lack of jurisdiction.

(d) In conducting an investigation under this part, the investigator, for the purpose of determining whether a violation of § 708.5 has occurred, may enter and inspect places and records (and make copies thereof), may question persons alleged to have been involved in discriminatory acts and other employees of the charged contractor, and may require the production of any documentary or other evidence deemed necessary. The contractor shall cooperate fully with the investigator in making available employees and all pertinent evidence, including records.

(e) To the extent practicable, investigations under this part shall be conducted in a manner that protects the confidentiality of any person (other than the complainant) who requests leave to provide information on a confidential basis. Confidentiality shall not be extended to any persons who in the course of their employment, or due to the nature of their position, are required to provide such information, and all grants of confidentiality shall be subject to waiver by the Hearing Officer if the Hearing Officer determines that waiver is necessary to achieve a fair adjudication of the case. The investigator shall advise all persons to whom confidentiality is granted that such grant of confidentiality is conditional, not absolute.

(f) The investigator, within 60 days of appointment, shall submit a Report of Investigation to the Director. The Report of Investigation shall become a part of the record and shall state specifically a finding, and the factual basis for such finding, with respect to each alleged discriminatory act. Within 10 days of receipt of the Report of

Investigation, the Director shall serve it on the parties involved by certified mail.

**§ 708.9 Hearing.**

(a) Unless a complaint has been dismissed pursuant to § 708.8, within 15 days of receipt of the Report of Investigation, a party may, in writing, request a hearing on the complaint. Upon the request of one of the parties for a hearing, the Director shall transmit the complaint file to the Office of Hearings and Appeals.

(b) Upon receipt of the complaint file from the Director, the Director, Office of Hearings and Appeals shall appoint, as soon as practicable, a Hearing Officer to conduct a hearing and shall transmit to the Hearing Officer a copy of the file, including the Report of Investigation. The Hearing Office shall, within seven days following receipt of the complaint file, notify the parties of a day, time, and place for the hearing. Hearings will normally be held at or near the appropriate DOE field organization, within 60 days from the date the complaint file is received by the Hearing Officer unless the Hearing Officer determines that another location would be more appropriate, or unless the complaint is earlier settled by the parties.

(c) In all proceedings under this part, the parties shall have the right to be represented by a person of their own choosing. Formal rules of evidence shall not apply, but shall be used as a guide for application of procedures and principles designed to assure production of the most probative evidence available. The Hearing Officer may exclude evidence which is immaterial, irrelevant, or unduly repetitious. The Hearing Officer is specifically prohibited from initiating or otherwise engaging in *ex parte* discussions on a complaint matter at any time during the pendency of the complaint proceeding under this part.

(d) The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once

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the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

(e) Testimony of witnesses shall be given under oath or affirmation, and the witnesses shall be subject to cross-examination. Witnesses shall be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury.

(f) At his or her discretion, the Hearing Officer may arrange for the issuance of subpoenas for witnesses to attend the Hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing of the necessity for such witness or evidence has been made to the satisfaction of the Hearing Officer.

(g) All hearings shall be mechanically or stenographically reported. All evidence upon which the Hearing Officer relies for the recommended decision under § 708.10(b) shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits and other pertinent documents or records, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

(h) Any party, upon request, may be allowed a reasonable time to file with the Hearing Officer a brief or statement of fact or law. A copy of any such brief or statement shall be filed with the Hearing Officer before or during the proceeding and shall be served by the submitting party upon each other party by certified mail. The parties may make oral closing arguments, but post-hearing briefs will only be permitted at the direction of the Hearing Officer. When permitted, any such brief shall be limited to the issue or issues specified by the Hearing Officer and shall be due within the time prescribed by the Hearing Officer.

(i) At the request of any party, the Hearing Officer may, at his or her discretion, extend the time for any hearing held pursuant to this § 708.9. Additionally, the Hearing Officer may, at

the request of any party, or on his or her own motion, dismiss a claim, defense, or party and make adverse findings—

(1) Upon the failure without good cause of any party or his or her representative to attend a hearing; or

(2) Upon the failure of any party to comply with a lawful order of the Hearing Officer.

(j) In any case where a dismissal of a claim, defense, or party is sought, the Hearing Officer shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the Hearing Officer shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense, or party. An order dismissing a claim, defense, or party may be appealed to the Director for reconsideration.

### § 708.10 Initial agency decision.

(a) If a hearing is not requested, the Director, within 30 days of expiration of the time set forth in § 708.9(a) for request of a hearing, shall issue an initial agency decision based upon the record, which decision shall be served upon the parties by certified mail. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with respect to each alleged discriminatory act. In making such findings, the Director may rely upon, but shall not be bound by, the findings contained in the Report of Investigation.

(b) If a hearing has been held, the Hearing Officer shall issue an initial agency decision within 30 days after the receipt of the transcript from the proceeding at which evidence was submitted or within 30 days after receipt of any post-hearing briefs permitted under § 708.9(h), whichever is later. The initial agency decision shall contain appropriate findings, conclusions, and an order, and shall set forth the factual basis for each and every finding with respect to each alleged discriminatory act. In making such findings, the Hearing Officer may rely upon, but shall not be bound by, the findings contained in the Report of Investigation. The